

FEDERAL MAGISTRATES COURT OF AUSTRALIA

BATRA v MINISTER FOR IMMIGRATION & ANOR

[2012] FMCA 544

MIGRATION – Migration Review Tribunal – cancellation of subclass 885 (Skilled – Residence) visa – skills assessment undertaken by Trades Recognition Australia (“TRA”) – TRA not approved and specified as an assessing body – TRA skills assessment of no effect – whether TRA skills assessment can be relied on as a bogus document for purposes of cancellation.

Migration Act 1958, ss.97, 101, 103, 107, 108, 109

Migration Regulations 1994, regs.2.26B, 2.41

B v Victorian Lawyers RPA Limited 6 VR 642, [\[2002\] VSCA 204](#), [2004] ALMD 6348

Chelfco Ninety-Four Pty Ltd v Road Traffic Authority [1985] VR 1

Dai v Minister for Immigration and Citizenship and Another [165 FCR 458](#), 243 ALR 642, 100 ALD 223, [\[2007\] FCAFC 199](#), [2008] ALMD 5215

Minister for Immigration and Citizenship v Brar [\(2012\) 126 ALD 99](#) [2012] FCAFC 30

Minister for Immigration and Multicultural Affairs v Bhardwaj [\(2002\) 209 CLR 597](#), (2002) 76 ALJR 598, (2002) 187 ALR 117, (2002) 67 ALD 615, [\[2002\] HCA 11](#)

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476, [77 ALJR 454](#), 195 ALR 24, 72 ALD 1, [\[2003\] HCA 2](#)

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355; (1998) 72 ALJR 841; [\(1998\) 153 ALR 490](#); [\[1998\] HCA 28](#)

R v Ashby (2010) 25 VR 107, [\[2010\] VSC 14](#), [2011] ALMD 1876

Silveira v Australian Institute of Management [113 FCR 218](#), 188 ALR 457, [\[2001\] FCA 803](#)

Singh v Minister for Immigration and Citizenship [2012] FMCA 145

Applicant: ANKIT BATRA

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: MIGRATION REVIEW TRIBUNAL

File number: MLG 450 of 2011

Judgment of:	Riley FM
Hearing date:	13 June 2012
Date of last submission:	13 June 2012
Delivered at:	Melbourne
Delivered on:	24 July 2012

REPRESENTATION

Counsel for the Applicant:	Ms Costello
Solicitors for the Applicant:	Da Gama Pereira & Associates
Counsel for the First Respondent:	Chris Horan
Solicitors for the First Respondent:	Clayton Utz
Counsel for the Second Respondent:	No appearance
Solicitors for the Second Respondent:	Clayton Utz

ORDERS

- (1) The application filed on 1 April 2011, amended on 4 July 2011, further amended on 7 May 2012 and further, further amended on 18 June 2012, be dismissed.
- (2) The applicant pay the first respondent's costs, fixed in the sum of \$6,471.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT MELBOURNE**

MLG 450 of 2011

ANKIT BATRA
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application for review of a decision of the Migration Review Tribunal. The Tribunal affirmed a decision of a delegate to cancel the applicant's subclass 885 (Skilled – Residence) visa. The cancellation was made under s.109(1) of the *Migration Act 1958* (“the Act”). That subsection, in broad terms, permits the Minister to cancel a visa where incorrect information has been provided in the visa application.
2. On 17 February 2008, the applicant lodged an application for a skilled migration visa. He claimed to have experience as a pastry cook. At the time of the application, it was understood that, to be able to obtain the relevant type of visa on the basis of being a pastry cook, the applicant's skills needed to be assessed by Trades Recognition Australia (“TRA”).

To qualify for the visa that the applicant sought, TRA relevantly required each applicant to have 900 hours of experience as a pastry cook.

3. For the purpose of obtaining a visa, the applicant submitted to TRA a work reference which said he had done more than 900 hours of unpaid work for O’Hea’s Bakery & Deli as a pastry cook. The work reference was false. It appears that the applicant had done no work at all for O’Hea’s Bakery & Deli.
4. However, the TRA understood the work reference to be genuine. As a result, the TRA assessed the applicant as being qualified for the visa he sought. The TRA sent its assessment to the Department of Immigration and Citizenship (“the Department”). On the basis of the TRA assessment, and other things, the applicant was given a visa on 9 December 2008.
5. On 18 June 2010, the Department sent the applicant a notice of intention to consider cancellation of his visa (CB58 to 67). The notice alleged that:
 - a) the Department’s investigation team had executed a search warrant at O’heas Bakery & Deli;
 - b) a mediator had admitted to fabricating work references from O’Hea’s Bakery & Deli for a number of overseas applicants;
 - c) the mediator had admitted in a taped record of interview to having paid the signatory of the applicant’s work reference in exchange for the documents;
 - d) the work reference the applicant submitted to TRA was not genuine;
 - e) the TRA skills assessment of the applicant was obtained because of false or misleading information;
 - f) the TRA skills assessment of the applicant was therefore a bogus document within the meaning of s.97 of the Act;
 - g) the applicant presented the bogus TRA skills assessment to an officer of the Department;

- h) consequently, the applicant failed to comply with s.103 of the Act;
 - i) the applicant said in his application that he was a pastry cook;
 - j) that claim entailed an assertion that he had completed the required period of work experience for TRA accreditation; and
 - k) as he had not done so, the applicant had breached s.101 of the Act.
6. The applicant, by his solicitor and migration agent, responded to the notice of intention to consider cancellation of his visa (CB74 to 96). The solicitor and agent did not dispute the falsity of the applicant's work reference. Instead, the solicitor and agent argued, among other things, that:
- a) there was no breach of s.101 of the Act;
 - b) the TRA was not a legal entity and was thus not a body capable of being an assessment authority under reg. 2.26B(1) of the *Migration Regulations 1994* ("the Regulations"); and
 - c) the relevant documents were not given to an officer, but to an authorised system, because they were lodged online.
7. The delegate did not accept the applicant's arguments and cancelled his visa on 24 September 2010. The applicant then sought review by the Tribunal.

The Tribunal's decision

8. The Tribunal said at paragraphs 25 and 26 of its reasons for decision:
25. *The applicant has, in the Tribunal's assessment, studiously avoided any direct comment on the truth or falsity of the central allegation against him, viz. that he was never employed as a pastry cook or in any capacity from 24 July 2006 to 15 June 2007 or at any other time at O'heas, contrary to the claims made in a purported work reference dated 10 June 2007, despite a direct invitation from the Tribunal to do so, and a clear indication that this matter would, subject to any comments he may care to make, be the*

reason or part of the reason for affirming the decision to cancel his visa.

26. *The Tribunal has seen evidence that in the course of an interview with Departmental investigators in November 2009, an individual admitted to receiving cash payments of between \$1,500 and \$2,400 from numerous visa applicants for fabricating employment references on their behalf, and paying the owner of O'heas between \$300 and \$500 for his signature on each such document. Hundreds of false work references were found at the residence of this individual, who confirmed that no international students had worked at O'heas. The Tribunal attaches substantial weight to this information, particulars of which were duly provided to the applicant with an invitation under s.359A of the Act to comment on them. Despite the implications being clearly spelt out to the applicant, his agent failed to respond directly, instead busying herself with procedural and legal issues of a largely tangential, technical or irrelevant kind.*
9. The Tribunal accepted the applicant's argument in relation to s.101 of the Act.
10. The Tribunal accepted that the relevant documents were not given to an officer, as alleged in the notice of intention to consider cancellation, but to an "authorised system" because they were lodged online. The Tribunal considered that the difference was a "minor, technical imprecision" which did not result in the invalidity of the notice of intention to consider cancellation.
11. In relation to the applicant's other arguments, the Tribunal said:
 29. *The Tribunal has read and considered the agent's submissions, which set forth an assortment of claims that go behind and beyond the applicant's non-compliant actions, e.g. that TRA is not a legal entity and therefore cannot be designated as a relevant assessing authority by the Minister. While the Tribunal commends the agent's diligence and creativity, it finds the bulk of her arguments misconceived, and in any event, has neither a need nor warrant to go behind the alleged breach in the way she urges. The bogus character of the TRA skills assessment is in no way altered or diminished by the alleged invalidity to which she refers; it was, in the Tribunal's view, obtained because of a false or misleading statement to the effect that the applicant had*

worked for 900 hours at O'heas. That is all that is required to bring it within the ambit of s.97(c). Moreover, the express terms of s.103 prohibit the presentation of any such bogus document to the Department, and do not provide for any exceptions or qualifications.

30. *The Tribunal is also satisfied, contrary to the agent's claims, that the 900 hours of work experience requirement was indeed a standard precondition for accreditation by TRA as a Pastry cook at the relevant time. It is also satisfied on the basis of its own examination of Departmental guidelines that a positive TRA skills assessment was in turn a conditio sine qua non of an applicant being granted 60 points in the General Points Test.*

12. The Tribunal considered that there had been non-compliance with s.103 of the Act in one of the ways specified in the notice of intention to consider cancellation of the visa. The Tribunal then considered the exercise of the discretion to cancel or not. The Tribunal concluded:

46. *The Tribunal regards the cancellation of a permanent visa as a matter of considerable gravity, and approaches the review of such matters with corresponding caution and care, mindful of the Briginshaw and related precepts discussed above. In the present case, it is satisfied to the required degree that the applicant committed an egregious breach of s.103 of the Act, in a premeditated and deliberate deception that was calculated to secure him a permanent visa to which he knew full well he was not entitled. His conduct involved a cynical betrayal of the trust and good faith on which the skills accreditation system, like many such administrative systems, almost inevitably relies in an era of dwindling public resources and risk management. The review applicant's misconduct represents an assault on the integrity of the Australian immigration system, and undermines the rationale for the Commonwealth's skilled migration program. In the final analysis, a scheme designed to bring skilled individuals, including pastry cooks, into Australia has netted the country a supermarket worker, who has never worked as a pastry cook, or in any other skilled capacity, since acquiring permanent residency.*

47. *The Tribunal notes that, since becoming aware of the impending cancellation of his visa, the applicant has busied himself with various charitable activities, and while commending him for these belated efforts at civic virtue,*

does not accept that they can expiate an egregious and calculated fraud.

The application to this court

13. The applicant filed an application in this court on 1 April 2011, an amended application on 4 July 2011, a further amended application on 7 May 2012 and a further, further amended application on 18 June 2012. The matter took a long time to come on for hearing, possibly because the parties were awaiting the outcome of the Full Federal Court's decision in *Minister for Immigration and Citizenship v Brar* (2012) 126 ALD 99 [2012] FCAFC 30. (The reason for the delay is not obvious from the court record; the matter was in another Federal Magistrate's docket until recently.)
14. In any event, in *Brar*, the Full Court (North, Greenwood and Besanko JJ) considered whether a notice of intention to consider cancellation was invalid because it said that a bogus document had been provided to an officer, when in fact it had been provided to an authorised system. The Full Court said at [61] that:

In our opinion, it was not Parliament's intention that all departures from the statements made in a notice under s 107 deprive the decision-maker of jurisdiction under ss 108 and 109 to making findings of non-compliance by the visa holder in the way described in the notice. The phrase "in the way described in the notice" must be read in light of the purpose of the statutory scheme which is to ensure that the visa holder has notice of the alleged non-compliance and an opportunity to dispute the allegations and to respond to them. A departure which is minor and insignificant in the context of the facts of a particular case and which does not go to the substance of the allegations of non-compliance does not deprive the decision-maker of jurisdiction under ss 108 and 109. The departure in this case should be so characterised. The central issue in terms of the allegations of non-compliance was the accuracy or otherwise of the work reference letter from Dom's and adequate particulars of the allegations with respect to that issue were given in the notice under s 107. Furthermore, the notice clearly referred to the date upon which the respondent lodged his application and the address to which it was sent (see [5] above). The respondent and his advisers would not have been under any

misapprehension as to the occasion upon which it was said that he had failed to comply with s 103 of the Act. Finally, even if the bogus document was given, presented or provided to an authorised system, it seems clear enough that eventually it would have come to the attention of an officer of the Department.

15. Following the Full Federal Court's decision in *Brar* being handed down, the applicant abandoned the grounds contained in the amended application filed on 4 July 2011. The applicant put forward in the further amended application filed on 7 May 2012 only one ground. However, at the hearing before this court, the applicant sought and was granted leave to resurrect ground 1(d), (e) and (f) of the application filed on 4 July 2011. The grounds that were ultimately before the court were encapsulated in the further, further amended application that was filed on 13 June 2012, and are as set out below.
16. The argument at the hearing before this court proceeded on the basis that the two grounds were interconnected. They will be considered together.
17. The first ground of review in the further, further amended application filed on 18 June 2012 is:

The Migration Review Tribunal fell into jurisdictional error in concluding that the Trade Recognition Australia is the relevant assessing authority for the occupation of Pastry Cook 4512-13.

Particulars

- (a) *There is no evidence that Trade Recognition Australia or any other person or body has been approved in writing by the Education Minister or the Employment Minister for the purpose of reg 2.26B(1A), to be the relevant assessing authority for the occupation of Pastry Cook.*
- (b) *The Tribunal erred in determining that instrument IMMI 07/058 for the purpose of reg 2.26B(1), relevantly specifying Trade Recognition Australia to be the relevant assessing authority for the occupation of Pastry Cook, is valid.*
- (c) *Without a validly approved and specified (reg 2.26B(1) and (1A)) relevant assessing authority for the occupation of Pastry Cook, Schedule 2, clauses 885.221, 885.222 were not capable of being met by the Applicant. Thus in the*

circumstances, Schedule 2, clauses 885.221, 885.222 are not applicable to this application.

18. The second ground of review in the further, further amended application filed on 18 June 2012 is:

The Migration Review Tribunal (“the Tribunal”) did not properly consider whether the applicant provided a “bogus document” in accordance with the statutory provisions of the Migration Act 1958 (Cth) (“the Act”).

Particulars

- (a) The TRA’s purported exercise of powers in relation to the applicant was invalid.*
- (b) Any purported exercise of power under reg. 2.26B of the Regulations by the Department of Education, Employment and Workplace Relations (“DEEWR”) was invalid.*
- (c) Being void, the TRA assessment could not have been material to the decision to grant the visa and so it was not a “bogus document” within the meaning of ss 97(b) and 103 of the Act and the applicant did not make a false or misleading statement to an officer of the Department.*

Submissions

19. The applicant submitted that the TRA was not properly appointed as an assessing authority and it had no power to set the standards by which an applicant might be assessed (such as the 900 hours of work experience). Regulation 2.26B of the Regulations provides that:

Relevant assessing authorities

- (1) Subject to subregulation (1A), the Minister may, by an instrument in writing for this subregulation, specify a person or body as the relevant assessing authority for:*

- (a) a skilled occupation; and*
- (b) one or more countries;*

for the purposes of an application for a skills assessment made by a resident of one of those countries.

(1A) The Minister must not make an instrument under subregulation (1) unless the person or body has been approved in writing as the relevant assessing authority for the occupation by:

(a) the Education Minister; or

(b) the Employment Minister.

(2) The standards against which the skills of a person are assessed by a relevant assessing authority for a skilled occupation must be the standards set by the relevant assessing authority for the skilled occupation.

20. The first respondent conceded that the TRA had not been validly specified as the relevant assessing authority for the occupation of pastry cook at the time of the applicant's application.¹ The applicant said that meant that:

- a) the TRA assessment of the applicant was a nullity;
- b) being a nullity, the TRA assessment could not be a bogus document for the purposes of s.103 of the Act;
- c) therefore, the applicant did not give an authorised person or an officer of the Department a bogus document; and
- d) therefore, the Tribunal was wrong to affirm the cancellation of the applicant's visa.

21. The first respondent said that the TRA assessment was not a nullity, because it was not an administrative decision or anything else to which the concept of a nullity could apply. The first respondent said that, even though the TRA was not validly specified as a relevant assessing authority, the TRA assessment was, as a matter of practical reality, a document based on false information. As such, the first respondent argued, the TRA assessment was a bogus document as defined, the applicant gave it to an officer or authorised system and he thus breached s.103 of the Act and triggered the cancellation provisions.

¹ This deficiency has been corrected by legislation with some retrospective effect. However, the first respondent conceded that the corrective legislation did not necessarily cure the problem in this case. The argument before this court proceeded on the basis that it was common ground that the TRA had not been validly specified as the relevant assessing authority for the occupation of pastry cook at the time of the applicant's application.

22. Section 103 of the Act provides that:

Bogus documents not to be given etc.

A non-citizen must not give, present or provide to an officer, an authorised system, the Minister, or a tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented or provided.

23. Section 97 of the Act defines ‘bogus document’ as follows:

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) ...;

(b) ...; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

24. In the present case, there was no dispute that the applicant obtained the TRA assessment because of a false or misleading statement, namely, the false work reference from O’Hea’s Bakery & Deli. Consequently, the TRA assessment was a bogus document as defined, unless the applicant is correct in saying that the TRA assessment was nothing at all.

25. Under s.107 of the Act, if the Minister considers that a visa holder did not comply with, relevantly, s.103 of the Act, the Minister may give that visa holder a notice under s.107 of the Act, being a notice of intention to consider cancellation of his or her visa. The Minister gave a s.107 notice to the applicant. That notice relevantly specified that the TRA assessment was a bogus document because it was obtained because of a false or misleading statement.

26. Section 108 of the Act required the Minister to consider any response to the notice and decide whether there was non-compliance in the way specified in the notice.

27. Subsection 109(1) of the Act provides that:

(1) *The Minister, after:*

- (a) deciding under section 108 that there was non-compliance by the holder of a visa; and*
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and*
 - (c) having regard to any prescribed circumstances;*
- may cancel the visa.*

28. The applicant conceded that, on a narrow reading of those provisions, the applicant had breached s.103 of the Act and his visa was liable to cancellation. However, the applicant argued that it was necessary to look at the provisions in context: *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; (1998) 72 ALJR 841; (1998) 153 ALR 490; [1998] HCA 28. The applicant argued that the context in this particular case included reg. 2.41 of the Regulations, which contains the prescribed circumstances referred to in s.109(1)(c) of the Act. Regulation 2.41 provides:

Whether to cancel visa - incorrect information or bogus document (Act, s 109 (1) (c))

For the purposes of paragraph 109 (1) (c) of the Act, the following circumstances are prescribed:

- (a) the correct information;*
- (b) the content of the genuine document (if any);*
- (c) the likely effect on a decision to grant a visa or immigration clear the visa holder of the correct information or the genuine document;*
- (d) the circumstances in which the non-compliance occurred;*
- (e) the present circumstances of the visa holder;*
- (f) the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act;*
- (g) any other instances of non-compliance by the visa holder known to the Minister;*
- (h) the time that has elapsed since the non-compliance;*

- (j) *any breaches of the law since the non-compliance and the seriousness of those breaches;*
- (k) *any contribution made by the holder to the community.*

Note: Under s. 109 of the Act, the Minister may cancel a visa if there was non-compliance by the holder of a kind set out in Subdivision C of Division 3 of Part 2 of the Act. The Minister is to have regard to the prescribed circumstances in considering whether to cancel the visa.

29. The applicant argued that reg.2.41(c) presented an insurmountable obstacle to the cancellation of the applicant's visa. That paragraph required consideration of:

the likely effect on a decision to grant a visa or immigration clear the visa holder of the correct information[.]

30. The applicant said that circumstance could not be considered, because the TRA had neither the power to impose requirements for the skills assessment (such as the 900 hours of work experience) nor the power to assess compliance with that requirement. Therefore, the applicant said, the Tribunal could not consider the likely effect of the correct information, because the false information about the 900 hours of work experience related to a requirement that the TRA had no power to impose.
31. The first respondent said none of that made a difference. The first respondent said that the prescribed circumstances were not conditions for the exercise of the discretion, but matters to which regard must be had, to the extent the various prescribed circumstances were relevant. The first respondent argued that, if a particular prescribed circumstance could not be considered in any meaningful way, that fact did not prevent the visa being cancelled.
32. Moreover, the first respondent argued that it was clear that, if the correct information had been provided, (namely information that the applicant had no work experience as a pastry cook) the applicant would not have been granted a visa.
33. The applicant said that there were no authorities directly on point. However, the applicant sought to argue by analogy and from basic principles.

34. The applicant relied on *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 77 ALJR 454, 195 ALR 24, 72 ALD 1, [2003] HCA 2, particularly at [76], where it was said that an administrative decision that involves jurisdictional error is regarded at law as no decision at all.
35. The first respondent said the TRA's skills assessment of the applicant was not an administrative decision. The first respondent relied for that proposition on *Silveira v Australian Institute of Management* 113 FCR 218, 188 ALR 457, [2001] FCA 803 at [30] to [36]. In *Silveira*, the applicant sought a review of a skills assessment under the *Administrative Decisions (Judicial Review) Act 1977*. The court held that the skills assessment was not a decision under an enactment, and the ADJR Act did not apply.
36. *Silveira* did not actually say that the skills assessment was not an administrative decision. In fact, *Silveira* seems to have proceeded on the assumption that a skills assessment is an administrative decision. If a skills assessment is an administrative decision, that would mean that the TRA skills assessment of the applicant, on the authority of *Plaintiff S157*, is no decision at all.
37. The applicant relied on *B v Victorian Lawyers RPA Limited* 6 VR 642, [2002] VSCA 204, [2004] ALMD 6348. In that case, Ormiston JA said that, in the absence of a delegation in writing, as required by the applicable legislation, there was no delegation at all. The applicant said this case stood for the proposition that a power to delegate for an important purpose, such as granting or cancelling a visa, should be read strictly.
38. The applicant also relied on *Chelfco Ninety-Four Pty Ltd v Road Traffic Authority* [1985] VR 1. In that case, Murphy J held (at 19) that there was no delegation by a certain body, and (at 22) that the purported decisions of the delegates were without authority, beyond power and of no effect.
39. The applicant also relied on *R v Ashby* (2010) 25 VR 107, [2010] VSC 14, [2011] ALMD 1876, where it was also held that an improper delegation was of no effect.

40. The first respondent said that those decisions were not to the point, because there was no delegation of authority in this case. The TRA was simply nominated as an assessing body, but did not exercise any delegated statutory powers. The first respondent said that the present case did not concern the validity of a delegation.
41. The applicant then referred to *Dai v Minister for Immigration and Citizenship and Another* 165 FCR 458, 243 ALR 642, 100 ALD 223, [2007] FCAFC 199, [2008] ALMD 5215. at [34] to [36]. In that case, Gyles J held that condition 8202, as it then stood, was uncertain and unreasonable and not authorised by the Act, because it compelled a visa holder to comply with requirements that were not practicable or certain.
42. The applicant relied on *Dai* to argue that it would be unreasonable to rely on a document created by the TRA to cancel a visa where the TRA had no power to exercise functions under the Act and no power to impose conditions for a skills assessment.
43. The applicant also relied on *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) [209 CLR 597](#), (2002) 76 ALJR 598, (2002) 187 ALR 117, (2002) 67 ALD 615, [2002] HCA 11, particularly at [51], [53], [151], [152] and [153]. In the last mentioned paragraph, Hayne J said that:
- Nothing in the Act requires (or permits) the conclusion that despite the jurisdictional error, some relevant legal consequence should be attributed to the September decision. In particular, the fact that the Federal Court had only limited jurisdiction to review the decision does not lead to the conclusion that the September decision is to be treated as having some effect. Once it is recognised that a court could set it aside for jurisdictional error, the decision can be seen to have no relevant legal consequences.*
44. Based on *Bhardwaj*, the applicant argued that the TRA skills assessment in this case could not have the legal consequence of being the foundation of a cancellation decision.
45. The applicant also referred to the decision of Driver FM in *Singh v Minister for Immigration and Citizenship* [2012] FMCA 145. That case concerned an application for a visa rather than a cancellation of a visa. Mr Singh provided false or misleading information in his visa

application in relation to his skills assessment. The relevant Ministers had not approved and specified a skills assessment authority. Therefore, the court held, the visa criterion relating to skills assessment had no application to Mr Singh's case. The court held that false or misleading information provided by Mr Singh therefore did not relate to a **material** particular. The court concluded that the Tribunal had misunderstood which were the applicable criteria and issued writs of certiorari and mandamus.

46. In *R v Ashby*, Osborn J said at [33]:

A construction that would promote the purposes or object underlying the Act is to be preferred to a construction which would not promote that purpose.

47. The applicant said that the purpose of the provisions relating to bogus documents is that if a bogus document is provided in relation to the grant of a visa then the visa can be cancelled. The first respondent said that the purpose of the provisions relating to bogus documents is to prevent a fraud on the migration system. The applicant said that was not so, because the definition of bogus document in s.97(c) of the Act includes false or misleading statements whether or not they are made knowingly. The applicant said that, if the purpose of the legislation was to target fraud, there would be a mental element.

Consideration

48. I accept absolutely that the TRA skills assessment of the applicant had no legal effect, as a skills assessment. However, that does not mean that the skills assessment should be treated as never having existed, or as never having been sent to an officer or an authorised system.
49. The fact is that the applicant's TRA skills assessment was obtained "because of a false or misleading statement", being the statement that the applicant had 900 hours of work experience with O'Hea's Bakery & Deli. Consequently, the skills assessment was a bogus document within the meaning of s.97(c) of the Act. The applicant sent his TRA skills assessment to an officer or an authorised system. He thus breached s.103 of the Act and triggered the cancellation provisions.

50. Even though the TRA had no power to make a skills assessment, and the purported skills assessment did not have any effect as a skills assessment, it remained a bogus document within the meaning of the Act.
51. It is immaterial whether or not the skills assessment was an administrative decision, or whether or not the TRA was purportedly delegated to perform a function, or whether the skills assessment was no assessment at all. The TRA skills assessment had a physical reality as a document obtained because of false or misleading information. As such, it was a bogus document.
52. The applicant placed great weight on the fact that s.109(1)(c) of the Act requires consideration of the circumstance prescribed in reg. 2.41(c) of the Regulations, namely:

the likely effect on a decision to grant a visa or immigration clear the visa holder of the correct information[.]

53. The applicant argued that the Tribunal could not properly consider that circumstance, because it involved hypotheticals, given that the TRA was not able to impose a requirement for a certain number of hours of work experience.
54. However, the first respondent is correct in saying that the prescribed circumstances in reg. 2.41 are not conditions that must be satisfied before there can be a cancellation. They are circumstances to which the decision maker must have regard, to the extent that they are relevant.
55. In any event, the Tribunal did have regard to the circumstance prescribed in reg. 2.41(c). The Tribunal said at [37]:

The likely effect on a decision to grant a visa or immigration clear the visa holder of the correct information or the genuine document

37. The Tribunal is satisfied that the positive TRA skills assessment would not have been issued had it been apparent that the applicant had no work experience, and that in the absence of the TRA accreditation, the applicant would not have been awarded 60 points for skill in the GPT. Without those 60 points, he would not have met the pool or pass

marks in force at the relevant time, and the visa would not have been issued to him.

56. The Tribunal's consideration of the prescribed circumstance in reg. 2.41(c) seems to be sound, whether or not the TRA had been approved and specified as an assessing body and whether or not the TRA could impose a requirement of 900 hours of work experience. That is, on any view, the applicant would not have been awarded 60 points for skill and without those 60 points, he could not have qualified for the visa. The applicant made no particular submissions about the Tribunal's findings in this regard.
57. In relation to the purpose of the legislation concerning bogus documents, it seems to me that the evident purpose of the legislation is to ensure that visas are held only by those people who have met the criteria for them. The conclusions reached above are consistent with that purpose.
58. I do not accept the applicant's submission, based on *Dai*, that it would be unreasonable to rely on a document created by the TRA to cancel a visa where the TRA had no power to exercise functions under the Act and no power to impose conditions for a skills assessment. For the reasons given above, the validity of the TRA skills assessment, as a skills assessment, was irrelevant. The TRA skills assessment was a bogus document within the meaning of the Act and the applicant gave it to an officer or authorised system. It is not unreasonable for the Tribunal to rely on such a document to cancel a visa.
59. There was no particular argument about clauses 885.221 and 885.222 of Schedule 2 to the Regulations. Those clauses provide:

885.22 *Criteria to be satisfied at time of decision*

885.221 *The applicant has the qualifying score when assessed in relation to the visa under Subdivision B of Division 3 of Part 2 of the Act.*

Note *That Subdivision of the Act provides in sections 92 to 96 for the application of a points system, under which applicants for relevant visas are given an assessed score based on the prescribed number of points for particular attributes, which is assessed against the relevant pool mark and pass mark.*

The prescribed points and the manner of their allocation are provided for in Division 2.6 and Schedules 6B and 6C of these Regulations. Pool marks and pass marks are set from time to time by the Minister by instrument (Act, section 96).

885.222 (1) *The skills of the applicant have been assessed by the relevant assessing authority as suitable by for the applicant's nominated skilled by occupation.*

(2) *If the assessment mentioned in subclause (1) is made on the basis of a qualification obtained in Australia while the applicant was the holder of a student visa, the qualification was obtained as a result of studying a registered course.*

60. However, the point made in the further, further amended application is that:

Schedule 2, clauses 885.221, 885.222 were not capable of being met by the Applicant. Thus in the circumstances, Schedule 2, clauses 885.221,885.222 are not applicable to this application.

61. That is not the way the provisions work. If the applicant was unable to meet the criteria, whether or not that was for reasons beyond his control, he was unable to qualify for the relevant visa. *Singh* is different because of the requirement in that case for misleading information to relate to a material particular, and because there were other visa criteria that the applicant was able to satisfy to qualify for the relevant visa: see [66] of *Singh*.

62. For these reasons, the application must be dismissed with costs.

I certify that the preceding sixty-two (62) paragraphs are a true copy of the reasons for judgment of Riley FM

Date: 24 July 2012